TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1042. ~~1047~~ ~~372~~ 98

JAMES DOUGHERTY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 29, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Complaint.*

In the Circuit Court of the United States for the Ninth Circuit, District of California. — Term.

JAMES DOUGHERTY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, in the State of California, Defendant. } At Law.

James Dougherty, who is a subject of the Queen of Great Britain and Ireland, complains of The City and County of San Francisco, a municipal corporation formed under the laws of the State of California, and alleges:

I.

That said defendant as aforesaid is now and at all times hereinafter mentioned was a municipal corporation, and was duly incorporated under and by virtue of an act of the Legislature of the State of California, approved April 19, 1856, and by virtue of said act as aforesaid was given certain corporate powers, and had duties and obligations imposed upon it as such corporation, and which duties and obligations are fully set forth in said act and certain supplemental acts amendatory thereto, and which said act of the 19th day of April, 1856, and all of said acts amendatory thereto, were duly passed for the government and guidance of said defendant, The City and County of San Francisco, a municipal corporation.

That the officers of said corporation, at the times hereinafter mentioned, consisted of a mayor and a board of supervisors, a superintendent of public street, highways, and squares, and their powers and duties were duly set out in said act and acts, and also the powers and duties of other officers of said defendant, The City and County of San Francisco, a municipal corporation as aforesaid.

II.

That by section 1 of article 4 of said act and acts amendatory and supplemental thereto as aforesaid the jurisdiction of all public streets, lanes, and alleys in and within the limits of said corporation, as laid down on the official map of said defendant, was vested in the board of supervisors, officers of said defendant, with power to improve and repair and grade said streets, alleys, lanes, and courts, and to order said repairs, grades, and improvements to be done within the corporate limits of said defendant, The City and County of San Francisco, [a] municipal corporation as aforesaid; that before the said board of supervisors could order any improvements, repairs, or grades to be done or performed on the streets, lanes, or alleys of said defendant, a notice, called a resolution of intention, that such work to be designated in said notice was necessary to be done on the street, lane, or alley, and said notice was to be published in the manner designated by law.

That Bay street is a street within the corporate limits of the boundaries of the defendant, The City and County of San Francisco.

III.

That on or about the 25th day of March, 1867, the board of supervisors of said city and county, after receiving the petition of the property owners as required by law and the provisions of the act incorporating and consolidating said city and county, duly adopted and thereupon ordered the following resolution of intention to be published in the manner prescribed by law for such publication, and which resolution of intention is in words and figures following:

"*Resolution of Intention No.* 6678.

"Resolved, That it is the intention of this board to order the following street work:

"That Bay street, from Jones to Dupont street, be graded, and this resolution is ordered to be published for a period of ten days, Sundays excepted, from and after its passage, and notice is hereby given that all persons objecting to said work are required to file their objections in writing in the office of the clerk of the board of supervisors within ten days after the first publication hereof, stating how much frontage on said streets is represented and on what streets located."

That afterwards, to wit, on or about the 8th day of April, 1867, the said board of supervisors of said city and county duly adopted and thereupon ordered the following resolution to be published in the manner and time designated by law:

"*Resolution Ordering Street Work No.* 6727.

"Resolved, That the following street work be done in accordance with specifications to be published by the superintendent of public streets and highways, and under his supervision, namely:

2 "That Bay street, from Jones to Dupont street, be graded, and that the clerk is hereby authorized to advertise for proposals to do the above work."

IV.

That by reason of the resolutions heretofore mentioned, and by order of the said board of supervisors of said city and county of San Francisco aforesaid, the clerk of said board of supervisors did cause to be published a certain notice in words and figures following, to wit:

"CLERK'S OFFICE, BOARD OF SUPERVISORS,
"SAN FRANCISCO, *March* 1, 1869.

"In accordance with resolution No. 6727 of the board of supervisors, ordering street work, sealed proposals will be received for five days, at the office of the clerk of the board, for the following work, to be done under the supervision of the superintendent of public streets and highways and in accordance with the following specifications, viz:

"For grading Bay street, from Jones to Dupont street.—The above-named portion of Bay street is to be graded to the official height and line, and the roadway, when completed, is to have a crown to the centre of (10) ten inches from the bottom of the gutterways. The work is to be done in a good and workmanlike manner under the direction and to the satisfaction of the superintendent of public streets and highways.

"M. C. SMITH,
"*Superintendent of Public Streets and Highways.*

"NOTICE.—Bidders will estimate by the cubic yard. In order to preserve uniformity and to facilitate the award the board have resolved to receive no bids unless made upon the blank forms prepared by the committee, and signed by two or more sureties, in the sum of $1,000, for the performance of the work. Blanks furnished by the clerk. The board reserves the right to reject any or all bids, as the public good may require. No bid will be received after April 20, 1867, at four o'clock p. m.

"JOHN A. RUSSELL, *Clerk.*"

And said notice was duly published, and after sundry and divers persons had made proposals for the performance of said work, in pursuance to said invitation for proposals as aforesaid, one George Dougherty made a proposal, in accordance with the terms of said notice, to do and perform said work for the sum of 99⅞ cents per cubic yard, and the board of supervisors of said defendant, The City and County of San Francisco, did, in open session, open and examine said bids, and thereupon did award to the said George Dougherty said contract, which award is in words and figures following:

"*Resolution of Award No.* 9662.

"Resolved, That the contract for grading Bay street, from Jones to Dupont street, be, and the same is hereby, awarded to George Dougherty (provided his sureties are satisfactory to the superintendent of public streets and highways), he being the lowest responsible bidder therefor, at the following price, viz:

"For grading, 99⅞ cents per cubic yard.

"And that the clerk is hereby directed to advertise this award, as required by law.

"In board of supervisors, April 19, 1869."

V.

That the said George Dougherty, at and before the commencement of said work of grading Bay street, from Jones to Dupont street, execute a bond in the sum of $20,000, payable to The City and County of San Francisco, the defendant herein, with two sureties to the satisfaction and approval of the superintendent of public streets and highways, said bond being conditioned for the faithful performance of said contract on the part of said George Dougherty, and said bond is now in the possession of said defendant, said contract being in words and figures:

"*Street Contract No.* 4091. *Award No.* 9662. *N. S.*

"This agreement, made and entered into this eighth day of May, 1869, by and between George Dougherty, of the city and county of San Francisco, State of California, party of the first part, and M. C. Smith, superintendent of public streets and highways, of the city and county of San Francisco, State of California, by the authority granted to him, the said superintendent of public streets and highways, in an act entitled "An act amendatory of article IV of an act entitled an act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof, approved the 19th day of April, 1856, repealing sections thirty-six to sixty-four, inclusive, and all acts and parts of acts amendatory and supplementary thereof and substituting this act for said article IV, and all acts amendatory thereof and supplementary thereto," party of the second part: Whereas the said party of the first part (as by reference to the record of the proceedings of the board of supervisors of said city and county on the 19th day of April, 1869) has been awarded the contract for the work hereinafter mentioned: Now, therefore, these presents witnesseth that the said party of the first part, for the consideration hereinafter mentioned, promises and agrees with M. C. Smith, as superintendent of public streets and highways, and not otherwise, that he will do and perform, or cause to be done and performed, in a good and workmanlike manner, under the direction and to the satisfaction of the said superintendent, and furnish the necessary materials required for the execution and completion thereof, all the work to be performed, by grading Bay street, from Jones to Dupont street, in the city and county of San Francisco, according to the specifications hereunto annexed; and the said M. C. Smith, acting in his official capacity as superintendent of public streets and highways, and not individually, promises and agrees that on the performance of the covenants as aforesaid by the said party of the first part he will duly make and issue an assessment, and attach a warrant thereto as provided for in the aforementioned acts, for the expenses of the work aforesaid, at the following prices, to wit: Grading, per cubic yard, 99⅞ cents. And it is further mutually agreed between the parties hereto that eight hours shall constitute a legal day's work for all work done by any person employed by said party of the first part in performing this contract, and said party of the first part agrees not to permit any person so employed to work more than eight hours per day; and in case of violation of this covenant, said party of the second part shall be released from all the obligations herein contained, and the party of the first part shall not be entitled to any pay for any of the work done. And it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the city and county of San Francisco be liable for any portion of the expense of the work aforesaid, nor for the delinquency of the persons or property assessed; nor shall the said M. C. Smith, superintendent

of public streets and highways, nor his sureties or bondsmen be liable or holden for the payment of any sum or sums for the above-mentioned work, nor for any delinquency of the persons or property assessed.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first herein mentioned.

[U. S. I. R. 10c. May 8, 1869. Bill of Lading.]

GEORGE DOUGHERTY. [SEAL.]
M. C. SMITH. [SEAL.]
Superintendent of Public Streets, Highways, and Squares.

Signed, sealed and delivered in the presence of—
S. D. DIKEMAN.

Specification. Award No. —.

For grading Bay street from Jones to Dupont street.—The above-named portion of Bay street is to be graded to the official height and line and the roadway, when completed, is to have a proper crown to the centre of (10) ten inches from the bottomof the gutterways; the work to be commenced within one hundred (100) days and completed within twelve hundred and sixty-five days from the date of the contract.

GEORGE DOUGHERTY.
M. C. SMITH,
Superintendent of Public Streets, Highways, and Squares.

VI.

That upon filing the foregoing bond the said George Dougherty did enter upon said contract, and was so engaged in grading Bay street, from Jones street to Dupont street, and had a large number of men, horses, and carts employed in said work, and was proceeding with all reasonable diligence in the prosecution of said work of grading Bay street from Jones to Dupont street, for the defendant, according to said agreement and contract as aforesaid and in good faith.

That while the said George Dougherty was so engaged as aforesaid an action was commenced in the fifteenth judicial district court of the State of California, in and for the city and county of San Francisco, by certain property owners abutting Bay street and the proposed line of improvement as aforesaid, to cancel and set aside the contract awarded to the said George Dougherty, and said action is entitled and numbered "5977, John H. Turney *et al vs.* George Dougherty and The City and County of San Francisco, defendants," the complaint in said action praying for an order enjoining and restraining said George Dougherty from further proceeding with said contract of grading Bay street from Jones street to Dupont street.

That the said John H. Turney filed in the said fifteenth district court aforesaid, upon said application for an injunction as aforesaid,

an undertaking in due form of law, before the order of injunction was granted; and upon the filing of the said undertaking as above the judge of said fifteenth district court did make and issue his certain order restraining the said George Dougherty, which is in words and figures:

"*Original Injunction.*

"(Title of court and cause.)

"The people of the State of California to George Dougherty and The City and County of San Francisco, defendants, send greeting:

The above-named plaintiff having filed complaint in our district court of the fifteenth judicial district against the above-named defendants praying for an injunction against the said defendants, requiring them to refrain from certain acts in said complaint and hereafter more particularly mentioned, on reading the said complaint in this action, duly verified, and it satisfactorily appearing to the judge of our said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given, we therefore, in consideration thereof and of the particular matters in said complaint set forth do strictly command you, and each and every of you, your officers, agents, and employés, that until the further order of said court you do absolutely refrain and desist from doing any work on the property described in the complaint herein as lying on each side of Bay street between the east side of Jones street and the west side of Dupont street, in the city and county of San Francisco, in pursuance of the contract and award set forth in the complaint in this action, to which reference is hereby expressly made, or from in any manner entering upon or interfering therewith, or from taking any further steps whatever in the fulfillment of said contract, and that defendant Dougherty do refrain and desist from negotiating or transferring said contract.

4 Witness Honorable Samuel H. Dwinelle, judge of the fifteenth judicial district, at the court-house in the city and county of San Francisco, and the seal of said district court, this 14th day of June, A. D. 1870.

JOHN HANNA, *Clerk.*

[SEAL.] By J. D. RUGGLES,
Dep. Clerk.

VII.

That on the receipt of a copy of the said injunction the said George Dougherty was compelled to abandon the said work, and the said George Dougherty, for himself and his codefendant therein, did appear in said action, and that on the 1st day of October, 1870, an order was made in said cause in said court, and said order is in words and figures, to wit:

"*Order Dissolving Injunction.*

"Sept. Term, Saturday, Oct. 1, 1870.

"JOHN H. TURNEY *et al.*
vs.
"GEORGE DOUGHERTY *et al.* } 5977.

"In this action defendants' motion to dissolve the injunction herein was heretofore submitted, and, due consideration being had, ordered that the injunction herein be dissolved, and, on plaintiffs' motion, ordered that proceedings be stayed for ten days."

That the said plaintiffs in said action, John H. Turney *et als.* [*vs.*] George Dougherty *et al.*, did serve and file in said cause a notice of appeal from said order as aforesaid, said notice of appeal being in words as follows:

"*Complaint.*

"(Title of court and cause.)

"You will please take notice that the appellants in the above-entitled action hereby appeal to the supreme court of this State from the order dissolving the injunction therein made and entered in the said district court on the 1st day of October, 1870, in favor of said respondents and against said appellants, and from the whole thereof.

"San Francisco, October 10, 1870.

"WHITING & NAPTHALY,
"*Plaintiffs' Attorney.*"

And in the time required by law the said plaintiffs in said action of Turney *et als. vs.* Dougherty *et als.* did file an undertaking on appeal in said cause in words and figures following:

"(Title of court and cause.)

"Whereas the plaintiffs in this action appeal to the supreme court of the State of California from an order made and entered in the said action in the said district court on the 1st day of October, A. D. 1870, dissolving an injunction granted in this cause against the defendants: Now, therefore, in consideration of the premises, and of such appeal, we, B. Gattel, by occupation an insurance agent, of said city and county of San Francisco, and George G. Harris, by occupation a capitalist, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars in gold coin of the United States, to which amount we do acknowledge ourselves jointly and severally bound.

"And whereas the appellants being desirous of staying all proceedings, and the force and effect of the said order dissolving the said injunction so appealed from, the said appellants for such purpose applied to the said district court on the tenth day of October,

1870, for an order fixing the amount of an additional undertaking for such purpose, the said court did then and there fix such amount at the sum of three hundred dollars:

"We therefore do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred dollars in the gold coin of the United States, being the amount fixed by the said order, that if the said order [be] appealed from, or any part of it be affirmed, the appellant shall pay in gold coin all damages which the said defendants shall suffer, or that shall be awarded against the appellants upon the said appeal, or which they may afterwards recover in consequence of said appeal.

"Dated this 12th day of October, 1870.

"B. GATTEL. [L. S.]
"GEO. G. HARRIS. [L. S.]"

VIII.

That said appeal to the supreme court of the State of California from said order was heard and determined on or about the 21st day of June, 1872, and the remittitur from said supreme court to the said district court was filed with the clerk of said court on or about the said 21st day of June, 1872, and said cause was dismissed on or about the 13th of March, 1877.

That afterwards, to wit, on the 26th of March, 1877, the board of *the* supervisors, officers of defendant as aforesaid, did adopt a resolution in words and figures following:

"*Resolution No.* 10425. (*New Series.*)

"Resolved, That the superintendents of public streets, highways, and squares be, and is hereby, directed to grant the following extensions of time on street contracts (among others), viz: To George Dougherty or assigns, on contract to grade Bay street, from Jones to Dupont street, an extension of time from the date of the expiration of time heretofore granted up to and until the 15th day of April, 1877."

And the said superintendent of public streets, highways, and squares did grant and cause to be recorded on said contract the following order, to wit:

"In accordance with resolution No. 10425 of the board of supervisors, passed the 25th day of March, 1877, I hereby grant and attach to street contract No. 4091, for grading Bay street, from Jones to Dupont streets, twelve hundred and thirty-seven (1237) days additional time for the completion of said work, this 29th day of March, 1877.

JOHN HAGAN,
Superintendent Public Streets, Highways, and Squares.

IX.

That the said George Dougherty did then and there, with all reasonable diligence, proceed to complete said work, and did, on the 15th day of April, 1877, or thereabouts, complete said work of grading Bay street, from Jones to Dupont streets, as aforesaid, and said work was duly accepted by the superintendent of public streets, highways, and squares of the defendant, The City and County of San Francisco; and the said George Dougherty did in all things conform to the specifications and agreement in said contract expressed to the satisfaction of the superintendent of public streets, highways, and squares, as aforesaid, and each and all of said acts performed by the said George Dougherty, in and about said work as aforesaid, were in good faith, and believing that all the acts of said defendant were according to the powers conferred upon them by the provisions of the acts of the Legislature heretofore mentioned.

X.

That upon the completion of said work as aforesaid, and the same being in all manner satisfactory to the superintendent of public streets, highways, and squares, and before the said superintendent of public streets, highways, and squares could make, issue, or deliver the assessment, as mentioned in said contract No. 4091, to the said George Dougherty, for said work of grading Bay street, from Jones to Dupont streets, an action was commenced in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco, wherein John H. Turney, Frederick McCrellish, and Stewart Menzies were plaintiffs and George Dougherty, John Hagan, superintendent of streets, etc., and The City and County of San Francisco were defendants.

That the complaint in said action prayed for an injunction and order of said court: "That the said John Hagan, and his successors in office, be perpetually enjoined and restrained from levying or recording said assessment or issuing said warrant to enforce or secure payment to said George Dougherty for grading Bay street, as mentioned in said contract between him and M. C. Smith, superintendent of public streets, etc., dated May 8, 1869."

That upon filing the undertaking, as required by law, for the issuance of said injunction and order, as aforesaid, an order of said court was duly made, and the said order is in words and figures following, to wit:

"*Order of Injunction.*

"(Title of court and cause.)

"To John Hagan, as superintendent of public streets, and his successors in office, his and their agents and employés:

"The above plaintiffs having commenced an action in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco against the above-named defendants, and having prayed for an injunction against the

said defendants requiring them to refrain from certain acts in said complaint, and hereinafter more particularly mentioned, on reading the complaint in said action, duly verified by the oath of John H. Turney, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given, it is therefore ordered by me, the judge of said district court of the nineteenth judicial district, that, until further order in the premises, you, the said John Hagan, as superintendent of public streets, and your successors in office, and your and their agents and employés, and all your counsellors, attorneys and solicitors and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from signing any warrant for the defendant Dougherty, or his assigns, for the work mentioned in the complaint herein as done on Bay street, and from recording said warrant in the public records of said city and county or in the department of public streets therein.

"E. D. WHEELER, *Judge.*"

That after serving a copy of said order of injunction on the said John Hagan as aforesaid, the said order was duly filed in the office of the clerk of said court on the 13th day of September, 1877, and said order of injunction was made perpetual on the 25th day of February, 1878, and a judgment of said court was duly given and made in favor of plaintiffs in said cause and against the defendants therein, and is now in full force and effect.

XI.

That by reason of such injunction as aforesaid the superintendent of public streets, highways, and squares of the defendant, The City and County of San Francisco, could not give or cause to be given or made the assessment mentioned in said contract, and which assessment was to be given to the said George Dougherty for and as compensation for the grading of Bay street, from Jones to Dupont streets, and the said assessment cannot be by law assessed on private property.

XII.

That Bay street, from Jones to Dupont street, in said city and county, was, at the commencement of said work, under water on the northerly line of said city and county, and subject to the action of the waves and storms and great washing by the ebbing and
6 flowing of the tide, and all of said work was so subject to said inconveniences; that at the date of the injunction and order first referred to in this complaint the said George Dougherty had filled in about 21,064 cubic yards; that all of said filling was carried and washed away by the influences hereinbefore mentioned; and after the said injunction was dissolved all of said 21,064 cubic yards, as aforesaid, had to be and was refilled by the said George Dougherty, and the total number of yards filled and graded by the

said George Dougherty was about 167,925 cubic yards, and the value of said work was and is about $167,716.40.

XIII.

That by reason of the failure of the defendant, The City and County of San Francisco, to issue or cause to be issued the assessment, as set forth in said contract, to the said George Dougherty, and by the defendant's breach of the covenants therein contained, said defendant having and now receiving large benefits from the result of the labor and money expended by the said George Dougherty, the said George Dougherty has suffered damage in the sum of $167,716.40.

XIV.

That on the 28th day of January, 1884, the said George Dougherty presented said claim for damages for the breach of said contract as aforesaid to the defendant, but the said defendant, through its board of supervisors, did, on said 28th day of January, 1884, wholly reject the said claim and all thereof, and no part of said claim, either for the work, labor, or money expended by the said George Dougherty, or as damages for the breach of said contract, has been paid to the said George Dougherty, or to any other person in his behalf.

XV.

That on May the 5th, 1884, plaintiff purchased, in good faith and for value, all the right, title, and interest in and to the said claim which the said George Dougherty had and has or may have against the defendant, The City and County of San Francisco, as aforesaid, for the breach of said contract, and the plaintiff is now the absolute owner of said claim, and each and every cause of action arising, growing out of, or resulting from the breach of the said contract between the said George Dougherty and the said defendant.

Whereupon plaintiff prays judgment against the defendant for the sum of $167,716.40, being the damages sustained by the said George Dougherty for the breach of said contract, together with interest at the rate of one per cent. per month from the 13th of September, 1877, to the entry of judgment herein, and for costs of suit.

JNO. J. COFFEY,
W. H. TOMPKINS,
Attorneys for Plaintiff.

——— ———,
Of Counsel.

UNITED STATES OF AMERICA, }
District of California, } ss:

At San Francisco county, district aforesaid, on this 24 day of May, 1884, personally appeared James Dougherty, the above-named —, who, being duly sworn according to law, deposeth and saith that he is the complainant in the foregoing bill, and has read the same and knows the contents thereof; that the said complaint is true of his own

knowledge, except as to those matters which are therein stated to be on information and belief of the complainant, and as to those matters he believes it to be true.

JAMES DOUGHERTY.

Subscribed and sworn to before me this 24th day of May, 1884.

F. D. MONCTON,
Commissioner of U. S. Circuit Court,
9th Circuit, District of California.

Endorsed: Filed May 26, 1884. L. S. B. Sawyer.

7 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

JAMES DOUGHERTY, Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, &c., Defendant.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

The President of the United States of America, greeting, to the City and County of San Francisco, a municipal corporation in the State of California:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or, if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to recover from you the sum of one hundred and sixty-seven thousand seven hundred sixteen $\frac{40}{100}$ dollars damages, alleged to have been sustained by one George Dougherty, and the claim therefor by said George Dougherty, transferred to plaintiff herein by reason of the breach of a certain contract, together with interest thereon at the rate of one per cent. per month from the 13th day of September, 1877, to date of entry of judgment herein and the costs of this action, all of which is more fully set out in the complaint on file herein, to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will take judgment against you for said sum of $167,716.40 *dollars*, to-

gether with interest thereon as aforesaid and the costs of this action.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

8

Endorsed.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 26th day of May, 1884, and personally served the same on the 27th day of May, 1884, by delivering to and leaving with Washington Bartlett, mayor of the city & county of San Francisco, said defendant named therein, personally, at the city & county of San Francisco, in said district, a certified copy thereof, together with a certified copy of the complaint attached thereto.

San Francisco, May 27th, 1884.

M. M. DREW,
U. S. Marshal,
By W. G. GREGORY, *Deputy*.

Filed May 27th, 1884.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

9

Demurrer.

In the Circuit Court of the United States for the Ninth Circuit, District of California.

JAMES DOUGHERTY, Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

Defendant, The City & County of San Francisco, demurs to plaintiff's complaint, and specifies as grounds of demurrer:

1st. That the court has no jurisdiction of the person of the defendant or of the subject of the action.

2d. That there is a defect of parties plaintiff.

3d. That there is a defect of parties defendant.

4th. That several causes of action have been improperly united.

5th. That the complaint does not state facts sufficient to constitute a cause of action.

10

6th. That said complaint shows that the cause of action is barred by the provisions of section 337 of the code of civil procedure of California; that the same is barred by the provisions of subdivision one, of section 338, of said code, and of subdivision three of the last-mentioned section; that the same is barred by the provisions of subdivision one, of section 339, of said code; that the

same is barred by the provisions of section 342 of said code; that the same is barred by the provisions of section 343 of said code.

Wherefore defendant prays judgment to be dismissed hence with its costs.

WILLIAM CRAIG,
City & County Att'y, Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. H. MEREDITH,
Of Counsel for Defendant.

11 Endorsed: Service of a copy of within original is hereby admitted this 6th day of June, 1884. Coffey & Thompson, att'ys for pl'ff. Filed June 6, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

12 *Answer.*

In the Circuit Court of the United States for the Ninth Circuit, District of California.

JAMES DOUGHERTY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, in the State of California, Defendant.

Now comes the defendant, and for answer to the bill of complaint filed herein:

I.

Admits that it is a corporation duly created and existing under and by virtue of the laws of the State of California.

II.

Defendant denies, upon information and belief, that by section 1, article 4, of said act and acts amendatory and supplemental thereto as aforesaid, the jurisdiction of all public streets, lanes, and
13 alleys in and within the limits of said corporation, as laid down on the official map of said defendant, was vested in the board of supervisors, officers of said defendant, with power to improve and repair and grade said streets, alleys, lanes, and courts, and to order said repairs, grades, and improvements to be done within the corporate limits of said defendant, The City and County of San Francisco, municipal corporation aforesaid, or that before the said board of supervisors could order any improvement, repairs, or grades to be done or performed on the streets, lanes, or alleys of said defendant a notice, called a resolution of intention, that such work to be designated in said notice was necessary to be done on the street, lane or alley, and said notice was to be published in the manner designated by law, or that Bay street is a street within the corporate limits of the boundaries of the defendant, The City and
14 County of San Francisco.

III.

Defendant denies, upon information and belief, that on or about the 25th day of March, 1867, the board of supervisors of said city and county, after receiving the petition of the property owners, as required by law and the provisions of the act incorporating and consolidating said city and county, duly adopted and thereupon ordered the following resolution of intention, to be published in the manner prescribed by law for such publication, and which resolution of intention is in words and figures following:

"*Resolution of Intention. No.* 6678.

"Resolved, That it is the intention of this board to order the following street work: That Bay street, from Jones to Dupont street, be graded, and this resolution is ordered to be published for a period of ten days, Sundays excepted, from and after its passage,
15 and notice is hereby given that all persons objecting to said work are required to file their objections in writing in the office of the clerk of the board of supervisors within ten days after the first publication hereof, stating how much frontage on said streets is represented, and on what streets located;" or that afterwards, to wit, on or about the 8th day of April, 1867, the said board of supervisors of said city and county duly adopted and thereupon ordered the following resolution to be published in the manner and time designated by law:

"*Resolution Ordering Street Work. No.* 6727.

"Resolved, That the following street work be done in accordance with specifications to be published by the superintendent of public streets and highways and under his supervision, namely: That Bay street, from Jones to Dupont street, be graded, and that the clerk is hereby authorized to advertise for proposals to do the above work."

16 IV.

Defendant denies, upon information and belief, that by reason of the resolutions heretofore mentioned, and by order of the said board of supervisors of said city and county of San Francisco aforesaid, the clerk of said board of supervisors did cause to be published a certain notice in words and figures following, to wit:

"CLERK'S OFFICE, BOARD OF SUPERVISORS,
"SAN FRANCISCO, *March 1st*, 1869.

"In accordance with resolution No. 6727 of the board of supervisors, ordering street work, sealed proposals will be received for five days, at the office of the clerk of the board, for the following work, to be done under the supervision of the superintendent of public streets and highways and in accordance with the following specifications, viz:

"For grading Bay street from Jones to Dupont street.—The above-

named portion of Bay street is to be graded to the official
17 height and line, and the roadway, when completed, is to have a crown to the centre of (10) ten inches from the bottom of the gutterways. The work is to be done in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of public streets and highways.

M. C. SMITH,
Superintendent of Public Streets and Highways.

NOTICE.—Bidders will estimate by the cubic yard. In order to preserve uniformity and to facilitate the award the board have resolved to receive no bids — made upon the blank forms prepared by the committee, and signed by two or more sureties, in the sum of $1,000, for the performance of the work. Blanks furnished by the clerk. The board reserves the right to reject any or all bids, as the public good may require. No bids will be received after April 20, 1867, at four o'clock p. m.

"JOHN A. RUSSELL, *Clerk.*"

18 Or that said notice was duly published, and after sundry and divers persons had made proposals for the performance of said work, in pursuance to said invitation for proposals as aforesaid, one George Dougherty made a proposal in accordance with the terms of said notice to do and perform said work for the sum of 99⅞ cents per cubic yard, and the board of supervisors of said defendant, The City and County of San Francisco, did in open session open and examine said bids, and thereupon did award to the said George Dougherty said contract, which award is in words and figures following:

"*Resolution of Award No.* 9662.

"Resolved, That the contract for grading Bay street from Jones to Dupont street, be, and the same is hereby, awarded to George Dougherty (provided his sureties are satisfactory to the superintendent of public streets and highways), he being the lowest re-
19 sponsible bidder therefor, at the following prices, viz:

"For grading, 99⅞ cents per cubic yard; and that the clerk is hereby directed to advertise this award, as required by law.

"In board of supervisors, April 19, 1869."

V.

Defendant denies, upon information and belief, that the said George Dougherty, at and before the commencement of said work of grading Bay street, from Jones to Dupont street, executed a bond in the sum of $20,000, payable to The City and County of San Francisco, the defendant herein, with two sureties, to the satisfaction and approval of the superintendent of public streets and highways, said bond being conditioned for the faithful performance of said contract on the part of said George Dougherty, or that said bond is now in the possession of said defendant, or that said contract is in the words and figures following:

Street Contract No. 4091. *Award No.* 9662, *N. S.*

20 This agreement, made and entered into this eighth day of May, 1869, by and between George Dougherty, of the city and county of San Francisco, State of California, party of the first part, and M. C. Smith, superintendent of public streets and highways, of the city and county of San Francisco, State of California, by the authority granted to him, the said superintendent of public streets and highways, in an act entitled "An act amendatory of article IV of an act entitled An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof, approved the 19th day of April, 1856, repealing sections 36 to 64, inclusive, and all acts and parts of acts amendatory and supplementary thereof, and substituting this act for said article IV and all acts amendatory thereof and supplementary thereto," party of the second part. Whereas the
21 said party of the first part (as by reference to the record of the proceedings of the board of supervisors of said city and county, on the 19th day of April, 1869) has been awarded the contract for the work hereinafter mentioned: Now, therefore, these presents witnesseth: That the said party of the first part, for the consideration hereinafter mentioned, promises and agrees with M. C. Smith, as superintendent of public streets and highways, and not otherwise, that he will do and perform, or cause to be done and performed, in a good and workmanlike manner, under the direction and to the satisfaction of the said superintendent, and furnish the necessary materials required for the execution and completion thereof, all the work to be performed—grading Bay street, from Jones to Dupont street—in the city and county of San Francisco—according to the specifications hereunto annexed; and the said M. C. Smith, acting in his official capacity as superintendent
22 of public streets and highways, and not individually, promises and agrees that on the performance of the covenants as aforesaid by the said party of the first part he will duly make and issue an assessment and attach a warrant thereto, as provided for in the aforementioned acts, for the expenses of the work aforesaid at the following prices, to wit: Grading, per cubic yard, 99⅝ cents; and it is further mutually agreed between the parties hereto that eight hours shall constitute a legal day's work for all work done by any person employed by said party of the first part in performing this contract, and said party of the first part agrees not to permit any person so employed to work more than eight hours per day, and in case of violation of this covenant said party of the second part shall be released from all the obligations herein contained, and the
23 party of the first part shall not be entitled to any pay for any of the work done; and it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the city and county of San Francisco be liable for any portion of the expense of the work aforesaid, nor for the delinquency of the

persons or property assessed; nor shall the said M. C. Smith, superintendent of public streets and highways, nor his sureties or bondsmen, be liable or holden for the payment of any sum or sums for the above-mentioned work, nor for any delinquency of the persons or property assessed.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first mentioned.

GEORGE DOUGHERTY. [SEAL.]
M. C. SMITH, [SEAL.]
Superintendent of Public Streets Highways & Squares.

24 Signed, sealed, and delivered in the presence of—
S. D. DIKEMAN.

[U. S. I. R. 10 c. May 8, 1869. Bill of lading.]

Specification. Award No. —.

For grading Bay street from Jones to Dupont street-.

The above-named portion of Bay street is to be graded to the official height and line, and the roadway, when completed, is to have a proper crown to the center of (10) ten inches from the bottom of the gutterways; the work to be commenced within one hundred days and completed within twelve hundred and sixty-five days from the date of the contract.

GEORGE DOUGHERTY.
M. C. SMITH,
Superintendent of Public Streets, Highways, and Squares.

VI.

Defendant denies, upon information and belief, that upon filing the foregoing bond the said George Dougherty did enter
25 upon said contract and was so engaged in grading Bay street from Jones street to Dupont street, and had a large number of men, horses, and carts employed in said work, or that he was proceeding with all reasonable diligence in the prosecution of said work of grading Bay street, from Jones to Dupont street, for the defendant according to said agreement and contract as aforesaid and in good faith, or that while the said George Dougherty was so engaged as aforesaid an action was commenced in the fifteenth judicial district court of the State of California in and for the city and county of San Francisco by certain property owners abutting Bay street and the proposed line of improvement as aforesaid, to cancel and set aside the contract awarded to the said George Dougherty, or that said action is entitled and numbered "5977, John H. Turney *et als. vs.* George Dougherty and The City and County of San Fran-
26 cisco, defendants," the complaint in said action praying for an order enjoining and restraining said George Dougherty from further proceeding with said contract of grading Bay street from Jones to Dupont street-, or that the said John H. Turney filed in the said fifteenth district court aforesaid, upon said application

for an injunction as aforesaid, an undertaking, in due form of law, before the order of injunction was granted, or that upon the filing of said undertaking, as above, the judge of said fifteenth district court did make and issue his certain order restraining the said George Dougherty, which is in words and figures —:

Original Injunction.

(Title of court and cause.)

The People of the State of California to George Dougherty and The City and County of San Francisco, defendants, send greeting:

The above-named plaintiff, having filed complaint in our district court of the fifteenth judicial district against the above-named
27 defendants praying for an injunction against the said defendants requiring them to refrain from certain acts in said complaint and hereafter more particularly mentioned, on reading the said complaint in this action, duly verified, and it satisfactorily appearing to the judge of our said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given, we therefore, in consideration thereof and of the particular matters in said complaint set forth, do strictly command you, and each and every of you, your officers, agents, and employees, that until the further order of said court you absolutely refrain and desist from doing any work on the property described in the complaint herein as lying on each side of Bay street, between the east side of Jones street and the west side of Dupont street, in the city and county of San Francisco, in pursuance of the contract and award set forth in the complaint in this
28 action, to which reference is hereby expressly made, or from in any manner entering upon or interfering therewith, or from taking any further steps whatever in the fulfillment of said contract, and that defendant Dougherty do refrain and desist from negotiating or transferring said contract.

Witness Honorable Samuel H. Dwinelle, judge of the fifteenth judicial district, at the court-house in the city and county of San Francisco, and the seal of said district court, this 14th day of June, A. D. 1870.

JOHN HANNA, *Clerk*,
[SEAL.] By J. D. RUGGLES,
Dep. Clerk.

VII.

Defendant denies, upon information and belief, that on the receipt of a copy of the said injunction the said George Dougherty was compelled to abandon the said work, or that the said George Dougherty, for himself and his codefendant therein, did appear in said
29 action, or that on the 1st day of October, 1870, an order was made in said cause in said court, or that said order is in words and figures, to wit:

Order Dissolving Injunction.

Sept. Term, Saturday, Oct. 1, 1870.

JOHN H. TURNEY *et al.*
vs.
GEORGE DOUGHERTY *et al.* } 5977.

In this action defendants' motion to dissolve the injunction herein was heretofore submitted, and, due consideration being had, ordered that the injunction herein be dissolved, and, on plaintiffs' motion, ordered that proceedings be stayed for ten days, or that the said plaintiff- in said action [of] John H. Turney *et als.* [*vs.*] George Dougherty *et al.* did serve and file in said cause a notice of appeal from said order as aforesaid, or that said notice of appeal is in words as follows:

(Title of court and cause.)

You will please take notice that the appellants in the above-entitled action hereby appeal to the supreme of this State from
30 the order dissolving the injunction therein made and entered in the said district court on the 1st day of October, 1870, in favor of said respondents and against said appellants, and from the whole thereof.

San Francisco, October 10, 1870.

WHITING & NAPTHALY,
Plaintiffs' Attorney-.

Or that in the time required by law the said plaintiffs in said action of Turney *et als. vs.* Dougherty *et als.* did file an undertaking on appeal in this cause in words and figures following:

(Title of court and cause.)

Whereas the plaintiffs in this action appeal to the supreme court of the State of California from an order made and entered in the said action in the said district court on the 1st day of October, A. D. 1870, dissolving an injunction granted in this cause against the defendants: Now, therefore, in consideration of the premises and of such appeal, we, B. Gattel, by occupation an insurance agent,
31 of said city and county of San Francisco, and George G. Harris, by occupation a capitalist, of the same place, do hereby, jointly and severally, undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, in gold coin of the United States, to which amount we do acknowledge ourselves jointly and severally bound; and whereas the appellants, being desirous of staying all proceedings and the force and effect of the said order dissolving the said injunction so appealed from, the said appellants for such purpose applied to the said district court on the tenth day of October, 1870, for an order fixing the amount of an additional undertaking for such purpose, the said court did then and there fix such amount at the

sum of three hundred dollars: We, therefore, do further, in
32 consideration thereof and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further, jointly and severally, bound in the further sum of three hundred dollars, in the gold coin of the United States, being the amount fixed by the said order, that if the said order appealed from or any part of it be affirmed the appellants shall pay in gold coin all damages which the said defendants shall suffer, or that shall be awarded against the appellants upon the said appeal, or which they may afterwards recover in consequence of said appeal.

Dated this 12th day of October, 1870.

B. GATTEL. [SEAL.]
GEORGE B. HARRIS. [SEAL.]

VIII.

Defendant denies, upon information and belief, that said appeal to the supreme court of the State of California from said order was heard and determined on or about the 21st day of June, 1872, or that the remittitur from said supreme court to the said dis-
33 trict court was filed with the clerk of said court on or about the said 21st day of June, 1872, or that said cause was dismissed on or about the 13th day of March, 1877, or that afterwards, to wit, on the 26th day of March, 1877, the board of *the* supervisors of defendant, as aforesaid, did adopt a resolution in words and figures following:

"*Resolution No.* 10425 (*New Series*).

"Resolved, That the superintendent of public streets, highways, and squares be, and he is hereby, directed to grant the following extensions of time on street contracts (among others), viz: To George Dougherty or assigns, on contract to grade Bay street from Jones to Dupont street, an extension of time from the date of the expiration of time heretofore granted up to and until the 15th day of April, 1877," or that the said superintendent of public streets, highways, and squares did grant and cause to be recorded on said con-
34 tract the following order, to wit: 'In accordance with resolution No. 10425 of the board of supervisors, passed the 25th day of March, 1877, I hereby grant and attach to street contract No. 4091, for grading Bay street from Jones to Dupont street, twelve hundred and thirty-seven (1,237) days additional time for the completion of said work, this 29th day of March, 1877.'

"JOHN HAGAN,
Superintendent Public Streets, Highways, and Squares."

IX.

Defendant denies, upon information and belief, that the said George Dougherty did then and there, with all reasonable diligence, proceed to complete said work, or did, on the 15th day of April, 1877, or thereabouts, complete work of grading Bay street, from Jones to

Dupont street, as aforesaid, or that said work was duly accepted by the superintendent of public streets, highways, and squares
35 of the defendant, The City and County of San Francisco, or that the said George Dougherty did in all things conform to the specification and agreement in said contract expressed, to the satisfaction of the superintendent of public streets, highways, and squares as aforesaid, or that each and all of said acts performed by the said George Dougherty in and about said work as aforesaid were in good faith, or believing that all of the acts of said defendant were according to the powers conferred upon them by the provisions of the acts of the Legislature heretofore mentioned.

X.

Defendant denies, upon information and belief, that upon the completion of said work as aforesaid, and the same being in all manner satisfactory to the superintendent of public streets, highways, and squares, and before the said superintendent of public streets, highways, and squares could make, issue, or deliver
36 the assessment as mentioned in said contract No. 4091, to the said George Dougherty for said work of grading Bay street, from Jones to Dupont street, an action was commenced in the district court of the nineteenth judicial district of the State of California, in and for the city and county of San Francisco, wherein John H. Turney, Frederick McCrellish, and Stewart Menzies were plaintiffs, and George Dougherty, John Hagan, superintendent of streets, etc., and The City and County of San Francisco were defendants, or that the complainant in said action prayed for an injunction and order of said court "that the said John Hagan and his successors in office be perpetually enjoined and restrained from levying or recording said assessment, or issuing said warrant to enforce or secure payment to said George Dougherty for grading Bay street, as mentioned in said contract between him and M. C. Smith, super-
37 intendent of public streets, etc., dated May 8, 1869," or that upon filing the undertaking as required by law for the issuance of said injunction and order as aforesaid, an order of said court was duly made, or that the said order is in words and figures following, to wit:

"*Order of Injunction.*

"(Title of court and cause.)

"To John Hagan, as superintendent of public streets, and his successors in office, his and their agents and employés:

"The above plaintiffs having commenced an action in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco against the above-named defendants, and having prayed for an injunction against the said defendants requiring them to refrain from certain acts in said complaint, and hereinafter more particularly mentioned, on reading the complaint in said action, duly verified by the oath of John

38 H. Turney, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given, it is therefore ordered by me, the judge of said district court of the nineteenth judicial district, that until further order in the premises, you, the said John Hagan, as superintendent of public streets, and your successors in office, and your and their agents and employés, and all your counsellors, attorneys, and solicitors, and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from signing any warrant for the defendant Dougherty, or his assigns, for the work mentioned in the complaint herein as done on Bay street, and from recording said warrant in the public records of said city and
39 county, or in the department of public streets therein.

"E. D. WHEELER, *Judge.*"

Or that after serving a copy of said order of injunction on the said John Hagan, as aforesaid, the said order was duly filed in the office of the clerk of said court on the 13th day of September, 1877; or that said order of injunction was made perpetual on the 25th day of February, 1878; or that a judgment of said court was given and made in favor of plaintiffs in said cause, and against the defendants therein, and is now in full force and effect.

XI.

Defendant denies, upon information and belief, that by reason of such injunction as aforesaid the superintendent of public streets, highways, and squares of the defendant, The City and County of San Francisco, could not give or cause to be given or made
40 the assessment mentioned in said contract, and which assessment was to be given to the said George Dougherty for and as compensation for the grading of Bay street from Jones to Dupont street, or that the said assessment cannot be by law assessed on private property.

XII.

Defendant denies, upon information and belief, that Bay street, from Jones to Dupont street, in said city and county, was at the commencement of said work under water on the northerly line of said city and county, and subject to the action of the waves and storms and great washing by the ebbing and flowing of the tide, or that all of said work was so subject to said inconveniences, or that at the date of the injunction and order first referred to in this complaint the said George Dougherty had filled in about 21,064 cubic yards, or that all of said filling was carried and washed away by the influences hereinbefore mentioned, or that after the said in-
41 junction was dissolved all of which said 21,064 cubic yards as aforesaid had to be and was refilled by the said George Dougherty; or that the total number of yards filled and graded by the said George Dougherty was about 167,925 cubic yards, or that the value of said work was and is about $167,716.40.

XIII.

Defendant denies, upon information and belief, that by reason of the failure of the defendant, The City and County of San Francisco, to issue or cause to be issued the assessment as set forth in said contract to the said George Dougherty, or that by the defendant's breach of the covenants therein contained, said defendant — having and now receiving large benefits from the result of the labor and money expended by the said George Dougherty, or that the said George Dougherty has suffered damage in the sum of $167,716.40.

42 XIV.

Defendant denies, upon information and belief, that on the 28th day of January, 1884, the said George Dougherty presented said claim for damages for the breach of said contract as aforesaid to the defendant, or that the said defendant, through its board of supervisors, did, on said 28th day of January, 1884, wholly reject the said claim and all thereof.

XV.

Defendant denies, upon information and belief, that on May 5th, 1884, plaintiff purchased in good faith and for value all the right, title, and interest in and to the said claim which the said George Dougherty had and has or may have against the defendant, The City and County of San Francisco, as aforesaid, for the breach of said contract, or that the plaintiff is now the absolute owner of said claim, and each and every cause of action arising, growing
43 out of, or resulting from the breach of the said contract between the said George Dougherty and the said defendant.

And for further and separate defense defendant avers that said demand is barred by the provisions of section 337 of the code of civil procedure.

And the same is barred by subdivision one of section 338 of said code.

And the same is barred by the provisions of subdivision one of section 339 of the said code.

And the same is barred by the provisions of section 343 of said code.

Wherefore defendant, having fully answered all the allegations in in plaintiff's complaint, prays to be hence dismissed with its costs.

WILLIAM CRAIG,
C. & Co. Att'y, Atty for Def't.

44 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles L. Weller, being first duly sworn, says that he is an officer of the defendant, The City and County of San Francisco; that he has read the foregoing answer in said action and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information, and belief, and as to those matters that he believes it to be true.

CHARLES L. WELLER.

Subscribed and sworn to before me this 29th day of September, 1884.

E. J. CASEY,
Deputy Co. Clerk.

Endorsed: Service of copy of within original is hereby admitted this 29th day of September, A. D. 1884. Jno. J. Coffey & W. H. Tompkins, attorneys for plaintiff.

45 Endorsed: Filed Sept, 29, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

46 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of California.

JAMES DOUGHERTY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant. } No. 3312.

This cause having come on regularly for trial on the 7th day of December, 1885, being a day in the November, 1885, term of said court, before the court sitting without a jury, and having been submitted to the court for consideration and decision upon the question of jurisdiction, and the court after due deliberation having ordered that this cause be dismissed for want of jurisdiction, with costs:

Now, therefore, by virtue of the law and by reason of the
47 premises aforesaid, it is considered by the court that the plaintiff take nothing by this action, that the defendant go hereof without day, and that said defendant recover of and from said plaintiff its costs in this behalf expended, taxed at —.

Judgment entered March 25, 1886.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 25th day of March, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed March 25, 1886. L. S. B. Sawyer, clerk.

48 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

JAMES DOUGHERTY
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 3312.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United

States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 25 day of March: A. D. 1886.

L. S. B. SAWYER, *Clerk*,
[SEAL.] By F. D. MONCTON,
Deputy Clerk.

49 Endorsed: Judgment-roll. Filed March 25, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton.

50 *Bond on Writ of Error.*

In the Supreme Court of the United States.

JAMES DOUGHERTY, Plaintiff in Error,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, in the State of California, Defendant in Error. } No. 3312.

Know all men by these presents that we, Barnaby Dougherty and John Dougherty, are held and firmly bound unto The City and County of San Francisco, a municipal corporation, in the State of California, defendant in error, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The City and County of San Francisco, a municipal corporation, in the State of California, its successors or assigns: to the payment of which,
51 well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the 21st day of April, 1886.

Whereas the above-named James Dougherty has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States of America for the district of California in the cause entitled James Dougherty, plaintiff, *versus* The City and County of San Francisco, a municipal corporation, in the State of California, defendant, No. 3312:

Now, therefore, the condition of this obligation is such that if the above-named James Dougherty, plaintiff in error, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

52 BARNABY DOUGHERTY. [SEAL.]
JOHN DOUGHERTY. [SEAL.]

Signed, sealed and delivered in the presence of—
W. B. BEAIZLEY.
F. D. MONCTON.

UNITED STATES OF AMERICA, } ss:
District of California, }

Barnaby Dougherty and John Dougherty, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

BARNABY DOUGHERTY. [SEAL.]
JOHN DOUGHERTY. [SEAL.]

Subscribed and sworn to before me this 21st day of April, 1886.

F. D. MONCTON,
Commissioner of U. S. Circuit Court,
9th Circuit, District of California.

53 Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, circuit judge. Filed April 24, 1886. L. S. B. Sawyer, clerk.

54 In the Circuit Court of the United States for the District of California.

JAMES DOUGHERTY
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, in the State of California. } No. 3312.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial district, in and for the district of California do hereby certify that the foregoing fifty-three written and printed pages, numbered from 1 to 53 inclusive, are a full, true and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

55 Witness my hand and the seal of the said circuit court, this 17th day of May, A. D. 1886.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit in and for the district of California, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between James Dougherty, plaintiff in error, and The City and County of San Francisco, a municipal corporation, in the State of California, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint

appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of April, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge, Ninth Judicial Circuit.

57 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

[Endorsed:] No. 3312. United States Supreme Court. James Dougherty, pl'ff in error, *vs.* The City and County of San Francisco, &c., def't in error. Writ of error. Filed May 15, 1886. L. S. B. Sawyer, clerk U. S. circuit court, 9th circuit, district of California, by F. D. Moncton, deputy clerk.

Service of a copy of the within writ of error is hereby acknowledged this 6 day of May, 1886.

JOHN L. LOVE,
City & Co. Attorney, Att'y for Def't in Error.

58 UNITED STATES OF AMERICA, *ss:*

To The City and County of San Francisco, a municipal corporation, in the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the eleventh day of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the district of California, wherein James Dougherty is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of America for the district of California, this 24th day of April, A. D. 1886, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
Circuit Judge, Ninth Judicial Circuit.

59 [Endorsed:] No. 3312. In the Supreme Court of the United States. James Dougherty, plaintiff in error, *vs.* The City and County of San Francisco, &c., defendant in error. Citation. Filed May 15th, 1886. L. S. B. Sawyer, clerk U S. circuit court, 9th circuit, district of California, by F. D. Monckton, deputy clerk.

Service of a copy of the within citation is hereby acknowledged this 6th day of May, 1886.

JOHN L. LOVE,
City & Co. Attorney, Att'y for Def't in Error.

Endorsed on cover: California C. C. U. S. No. 1042. James Dougherty, plaintiff in error, *vs.* The City and County of San Francisco. Filed September 29, 1886.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 98.

JAMES DOUGHERTY, *Plaintiff in Error,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, *Defendant in Error.*

Brief for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 98.

JAMES DOUGHERTY, *Plaintiff in Error,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, *Defendant in Error.*

Brief for Defendant in Error.

The record in this case discloses a declaration by the plaintiff, James Dougherty, (pp. 7–12,) and by defendant a demurrer (p. 13) and an answer embodying specific denials of allegations by plaintiff, and a plea of the California Statute of Limitations, (pp. 14–24,) then a submission to the court without a jury "*upon the question of jurisdiction*," and a judgment dismissing the cause for want of jurisdiction. (P. 25.)

Upon this record we have really to deal only with the plaintiff's declaration, the question for determination being, does it disclose a case within the court's jurisdiction.

We think it clear it does not, and with entire confidence ask for a judgment of affirmance.

Turning to the declaration we see that it sets forth that one George Dougherty had a contract with the defendant corporation to grade one of its streets; and, by the copy of the contract that is (p. 4) a part of it, that it was provided specifically in conformity with the will of the State expressed by the acts governing the corporation, that the expense of the work should be a charge upon and defrayed by the lands fronting on the particular streets, under a special assessment to be made by the Superintendent of

Streets, which provision was accompanied by this important stipulation, to wit: "And it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the city and county of San Francisco be liable for any portion of the expense of the work aforesaid, nor for the delinquency of the persons or property assessed."

We also see that the plaintiff asked the court (p. 11) not to direct the making, etc., of the assessment stipulated for specifically, but to give a judgment to plaintiff against the defendant corporation for a sum named upon an assumed general liability on the part of the corporation.

The plaintiff, *James* Dougherty, sues as assignee of *George* Dougherty, and, his suit being for a judgment for alleged breach of contract, he sues as assignee of a common *chose* in action.

George Dougherty stipulated for a special mode of payment, to wit, by the particular property-owners; his assignee sues for another mode, to wit, by the corporation upon a supposed general liability on its part.

Upon what reason is this based?

The declaration gives it as a fact (p. 9) that after George Dougherty had completed the work "and before the said Superintendent of the Public Streets * * * could make, issue, or deliver the assessment as mentioned in said contract, * * * John H. Turney, Frederick McCrellish, and Stewart Menzies" instituted a suit in the District Court of the 19th judicial district of the State of California against the city and county of San Francisco, its Superintendent of Streets, and George Dougherty to have enjoined the making, etc., of said assessment, and (p. 10) that on January 25, 1878, in said cause a perpetual injunction was decreed.

It is not alleged specifically, or otherwise, in the declaration—

1st. That the State's District Court was not one of general jurisdiction, or—

2d. That it did not have jurisdiction of the parties or the subject-matter, or—

3d. That the judgment was erroneous in law, or—

4th. That it was not final in said cause.

The declaration sets it forth as a further fact (p. 11) that the defendant corporation failed "to issue or cause to be issued the assessment as set forth in said contract," notwithstanding, of course, the perpetual injunction decreed by the State Court, whilst it was having and receiving large benefits from George Dougherty's expenditure of labor and money. It also sets forth that the defendant corporation refused to pay a claim for compensation for the work done, presented to it by George Dougherty long after the perpetual injunction was decreed by the State Court, as hereinbefore stated.

The suit, being as we have stated it, could only be, and was and is based upon the argument, that by reason of the corporation's alleged failure to issue or cause to be issued the assessment notwithstanding the injunction and its alleged enjoyment of benefit from George Dougherty's work, and its refusal to pay the claim he preferred for compensation after the perpetual injunction was decreed, the corporation was brought within the exception mentioned in the important provision of the contract hereinbefore set out and became thereby liable to a suit by George Dougherty for damages for breach of the contract.

With this analysis of the declaration we pass to a consideration of the law governing the case. It is very plain.

Though George Dougherty, as it is advanced argumentatively in the declaration, could have (before the assignment) sued the defendant corporation on the alleged breach of the contract in a court of the State, it by no means follows that he could have sued it in a United States court, for the jurisdiction of United States courts does not spring from State legislation.

On the facts alleged affimatively in the declaration it is certain that George Dougherty could have sued in a court of the United States only by alleging and proving that he was either an alien or citizen of a State other than California.

Now, the plaintiff, James Dougherty, who declares himself a British subject and the assignee of George Dougherty, does not allege that said George was an alien or a citizen of some State other than California. On the contrary, he makes the contract a part of his declaration by setting out a copy of it therein, and in that we read: "This agreement, made * * * by and be-

tween George Dougherty, of the city and county of San Francisco, State of California." * * *

Section 629 of the United States Revised Statutes provides: "That no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

Under this provision of law it has been held uniformly that the assignee of a common chose in action must show affirmatively by his pleadings, and, if controverted, by his proofs on the trial, that the original assignor could have maintained the suit if no assignment had been made.

(Bradley *vs.* Rhines, 8 Wall., 393.)
(Coal Co. *vs.* Blatchford, 11 Wall., 172.)

And as it is absolutely certain that the declaration in this case, as demonstrated by our canvass of it, contains not a single allegation that could bring the case within the jurisdiction of the United States Court, whose judgment is under review herein, the dismissal of the cause by that court was imperatively demanded, and the judgment will be affirmed.

The decree of the State Court in the suit of Turney *et al.* against George Dougherty *et al.* was a final and conclusive determination by a court of competent jurisdiction of said George Dougherty's want of right to implead the defendant corporation in either a court of law or equity on the contract in question, and, consequently, James Dougherty, his assignee, in instituting this suit in the United States court simply mistook his forum and his remedy.

All which is respectfully submitted.

ALBERT PIKE,
JOHN B. MHOON,
LUTHER H. PIKE,
Attorneys for Defendant in Error.